92-902

NO.

Supreme Court, U.S.
FILED
NOV 25 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

JOSEPH BERGHMAN AND JOETTA BERGHMAN

VERSUS

ATLANTIC RICHFIELD COMPANY, McDERMOTT, INC., and HOUMA INDUSTRIES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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39pp

QUESTIONS PRESENTED

1) May the Court of Appeals ignore the plain wording of the 1984 amendment to the Longshoreman and Harbor Workers' Compensation Act, 33 U.S.C. §905(a) in applying its own judicially created "borrowed servant" doctrine to extend tort immunity to a contractor not called upon to pay compensation?

2) When Congress has unambiguously expressed its intent to limit tort immunity by stating that a "contractor shall be deemed the *employer* of a subcontractor's employees *only if* the subcontractor fails to secure the payment of compensation," may the courts modify the LHWCA to expand judicial theories of immunity?

3) Does the fact that Congress did not specifically refer in its legislative history to the Fifth Circuit's thin line of precedent give license to that Circuit's disregard of the plain meaning of the 1984 amendment to the LHWCA §§904(a), 905(a) in favor of preserving its judicially created "borrowed servant" doctrine?

LIST OF ALL PARTIES TO THE PROCEEDING

Joseph Berghman and Joetta Berghman
Represented by Alonzo T. Stanga, III –
Stanga & Mustian, P.L.C.

Atlantic Richfield Company
Represented by Michael M. Christovich
Christovich & Kearney

McDermott, Inc.
Represented by Andre J. Mouledoux
Hebert, Mouledoux & Bland

Houma Industries, Inc., a division of LOR, Inc.
Represented by Philip E. Henderson,
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MISCELLANEOUS

Comment, "We Say What We Mean, and We Mean What We Say: the 1984 Amendments to Sections 904 and 905 of the LHWCA" *La.L.Rev.* 361 (Nov. 1985) 12

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OPINIONS RENDERED

No published opinion has been rendered in this matter in the United States District Court for the Eastern District of Louisiana or in the United States Court of Appeals for the Fifth Circuit. Accordingly, there are no references to official or unofficial reports of opinions delivered in the courts below.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

(i) The judgment sought to be reviewed was rendered by the United States Court of Appeals for the Fifth Circuit on August 31, 1992 affirming the judgment of the United States District Court for the Eastern District of Louisiana which was rendered on March 24, 1992.

(ii) Jurisdiction in the lower court is based upon the Outer Continental Shelf Lands Act, 43 U.S.C. §1331, et seq. This matter also involves provisions of the Longshoreman and Harbor Workers' Compensation Act, 33 U.S.C. §§ 904(a) and 905(a). Accordingly, the instant action presents a federal question and this Court has jurisdiction to review the judgment in question by Writ of Certiorari pursuant to 28 U.S.C. §1254.

STATUTES INVOLVED

This case involves the interpretation of 33 U.S. §§ 904(a) and 905(a), added to the Longshoreman and Harbor Workers' Compensation Act by the 1984 Amendments:

§ 904. Liability for compensation

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 7, 8, and 9 [33 USCS §§ 907, 908, 909]. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor.

§ 905. Exclusiveness of liability

(a) The liability of an employer prescribed in section 4 [33 USCS § 904] shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence

of the employee. For purposes of this subsectiion, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 4 [33 USCS § 904].

STATEMENT OF THE CASE

On August 4, 1990, petitioner, Joseph Berghman, was seriously injured while working on an offshore gas production platform owned and operated by Atlantic Richfield Corporation (ARCO). The platform was located in the Gulf of Mexico on the Outer Continental Shelf about five miles off of the Louisiana coast. Joseph Berghman had been hired by Liberty Services, Inc. (Liberty) as a roustabout. Earlier that year, in February, 1990, ARCO entered into a written contract with Liberty to provide labor employees to work upon ARCO's offshore platforms. The contract stated specifically that Liberty's employees were not to be deemed to be the employees or servants of ARCO for any purpose. The contract further provided that Liberty would provide workers compensation insurance under the LHWCA.

As a result of the injury on the ARCO platform, Joseph Berghman has undergone spinal surgery and his ability to work in the physically demanding offshore oil and gas business has been terminated. ARCO has paid no compensation benefits to petitioner. LHWCA compensation has been paid solely by the insurer for his direct employer, Liberty. Although Berghman took orders from the ARCO personnel, the evidence in the court below indicates that he was treated differently than the ARCO personnel in many aspects of his employment.

Petitioners, Joseph Berghman and his wife, filed suit against ARCO in the United States District Court on July 11, 1991 alleging negligence and strict liability against ARCO for causing the injuries to Berghman. Jurisdiction in the trial court was based on the Outer Continental Shelf Lands Act 43 U.S.C. § 1331, et seq., as well as, Diversity of Citizenship 28 U.S.C. § 1332. On August 1, 1991, an

amended complaint was filed adding as defendants the designer and fabricator of the platform, McDermott, Inc., as well as, Houma Industries, Inc., which had performed *painting and other services on the subject platform.*

ARCO filed a Motion for Summary Judgment on February 24, 1992 on the basis that Berghman was the "borrowed servant" of ARCO. The trial court considered the motion on briefs only and rendered judgment dismissing petitioners' suit against all parties on March 24, 1992. Petitioners thereafter filed a Motion to Amend the Order so as to dismiss ARCO only and for a designation as a final judgment under the meaning of Rule 54(b). The motion was granted and an amended partial judgment was entered on April 6, 1992. A Motion to Appeal the Dismissal of ARCO was filed by petitioners on April 15, 1992. The appeal was thereafter placed on summary calendar in the United States Court of Appeals for the Fifth Circuit. The Court of Appeal rendered a judgment affirming the trial court on August 31, 1992. It is from this judgment that the herein Petition for Writ of Certiorari is filed.

ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Congress has never intended to provide tort immunity under the Longshoreman and Harbor Workers' Compensation Act to contractors not called upon to pay compensation.

The Fifth Circuit Court of Appeals provided tort immunity to ARCO on the basis of Section 904(a) and 905(a) of the LHWCA. In doing so, the appellate court has ignored the clear wording of both sections as amended in 1984 by Congress. Section 904(a) states in part:

> "...a contractor [ARCO] be [is] liable for the payment of compensation...only if a subcontractor [Liberty Services] fails to secure the payment of compensation."

The 1984 amendment added the following unambiguous language to § 905(a):

> "...For purposes of this section [employer immunity], a contractor [here ARCO] shall be deemed the employer of a subcontractor's [here Liberty Services] employees *only if* the subcontractor fails to secure the payment of compensation as required by § 904 of this title. (Emphasis added.)

In our case, it is undisputed that ARCO has never been called upon to pay compensation to petitioner, Joseph Berghman. Mr. Berghman's compensation has been paid solely by his employer, Liberty Services. The clear interpretation of § 904(a) and § 905(a) is that ARCO cannot be deemed to be the employer of Berghman since Liberty Services did not fail to secure payments of compensation as provided in the above quoted language. The Fifth Circuit Court of Appeals has gone beyond the clear language of the LHWCA in order to inject its own theory of tort immunity. The court bases its theory on the doctrine of "borrowed servant." Historically, the "borrowed servant" doctrine was established in the common law in order to find *liability* (not immunity) under the theory of *respondeat superior.* Quite simply, if a principal borrowed the employee of another and exercised control over the said employee, it was held that the principal was responsible for the tortious injury caused by the employee to others. In a narrow line of Fifth Circuit cases that date back to the case entitled *Ruiz v. Shell Oil Co.*, 413 Fd.2d 310 (5th Cir. 1969) in *dicta*, the court reasoned that if a principal was responsible for the torts that a

a borrowed servant committed against others then the principal should be granted the same employer immunity as that of the servant's employer with regard to torts created by the principal against the employee. The *Ruiz* court, however, failed to examine the language of the LHWCA and the intent of Congress in limiting immunity to only those contractors that are actually called upon to secure the payment of compensation. The *Ruiz* court also failed to take into consideration the basic foundation of workmen's compensation statutes with regard to the concept of *quid pro quo*.

It is important to note that the *Ruiz dicta* and subsequent holdings pertaining to "borrowed servant" immunity have never been reviewed by this Court. In fact, the *Ruiz* panel ruled in favor of the plaintiff on factual grounds in holding that the employee was not the borrowed servant under the circumstances. Nevertheless, a thin line of cases followed the *dicta* in *Ruiz* through the time of the 1984 amendment to the LHWCA.

Following the 1984 LHWCA amendment, a line of four cases in the Fifth Circuit followed the clear wording of the amended Act and held that immunity would not be applied unless the contractor was called to pay compensation upon the default of the injured party's employer.[1] However, in 1985, in the case entitled *West v. Kerr McGee Corp.*, 765 F.2d 526 (Fifth Cir. 1985) again *in dicta* the Fifth Circuit (in a two-to-one decision) chose to disregard the newly amended language of §§ 904(a) and 905(a) in favor of retaining its own previous theory of "borrowed servant" immunity. As in *Ruiz*, the court in *West* also decided in

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[1] See *Martin v. Ingalls Shipbuilding*, 746 F.2d 231 (5th Cir. 1984); *Louviere v. Marathon Oil Company*, 755 F.2d 428 (5th Cir. 1985); *Weathersby v. Conoco Oil Company*, 752 F.2d 953 (5th Cir. 1984) and *Frederick v. Mobil Oil Corporation*, 765, F.2d 442 (5th Cir. 1985).

favor of the injured worker on factual grounds in holding that the employee was not a borrowed servant under those circumstances; therefore, the issue of "borrowed servant" immunity again was not raised by writ application to this Court since the worker had prevailed in his case on other grounds. Nevertheless, the doctrine has been faithfully followed by the district courts and appellate court panels in the Fifth Circuit. Because of this important question of federal law which has not been settled by this Honorable Court, this application should be granted. The Fifth Circuit's departure from the explicit wording of the LHWCA is deserving of this Court's attention in order to give guidance to the courts below.

Under general rules of statutory interpretation, the Courts should not go beyond the language of a statute when its language is clear and explicit.

In ignoring the clear language of § 905(a), the court in *West* decided to go beyond the statute and to refer to the Congressional record to explore the intent of Congress in amending the statute. As the panel discovered, the 1984 amendments to the LHWCA with regard to § 904(a) and § 905(a) were brought upon by the Supreme Court case entitled *Washington Metropolitan Area Transit Authority v. Johnson*, 467 U.S. 925, 104 S.Ct. 2827, 81 L.Ed.2d 768 (1984). In the *WMATA* case, this Court applied § 904(a) immunity in a situation where the principal contractor (WMATA) actually purchased and secured the compensation coverage for the employee of a subcontractor in what was called a "wrap-up" insurance policy. The Court held that since WMATA had "secured the payment of compensation," that the § 904(a) immunity should apply. Several months after the decision in 1984, Congress swiftly amended the language to clarify its purpose in providing immunity *only* in the situation where the employer defaults in

payment of compensation and the contractor is required to do so. Only in that event, would the principal contractor be granted statutory immunity. The Congress went so far as to state that the amended Act would be applied retroactively to cases pending at the time of its enactment. In so doing, Congress made it clear that it had disagreed with the Supreme Court's interpretation in extending immunity and that immunity could not be obtained by purchasing an insurance policy.

The Fifth Circuit's failure to abide by the plain language of the 1984 amendment violates basic rules of statutory interpretation. As this Court has stated: "Where as here, a resolution of a question of federal law turns on a statute, we look first to the statutory language, and *then* to the legislative history *if* the statutory language is unclear." *Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541, 1548 79 L.Ed.2d 891 (1984) (Emphasis supplied.) Since there is no ambiguity in the way that the law is written, the Court of Appeal had no basis to examine the legislative history. Further, nothing in the legislative history, nor in the way the Act is written, suggests that Congress intended to grant immunity to a contractor, such as ARCO, that does not pay compensation benefits.[2] To the contrary, Congress, by its actions in promptly amending the Act in the face of *WMATA*, made it patently clear that tort immunity is not favored and is not to be broadened. Moreover, the legislative history of the 1984 amendments to the LHWCA, Pub. L.No. 98-426, 98 Stat. 1639, 1641 (1984) sets forth the Congressional intent of the

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[2] It should be noted that in the ARCO-Liberty contract (Exhibit 1 attached to the Motion for Summary Judgment) ARCO goes to great lengths to compel Liberty to furnish compensation insurance. ARCO goes even further in its contract to state that: "All workers furnished by Contractor [Liberty]...shall not at any time or for any purpose whatsoever be employees or agents of ARCO."

amendment at page 24 as follows:

> "...The Conference substitute, in disapproving *WMATA v. Johnson*, achives the following: First, the obligation of the contractor to secure compensation for the employee of the subcontractor is a contingent one, which is triggered only upon the failure of the subcontractor to secure compensation for its own employees. Second, *the contractor remains amendable (sic) to suit by its subcontractor's employees in those instances where the subcontractor-employer has fulfilled its statutory obligation to secure compensation for its employees...*" (Emphasis supplied.)

The fact that the Congressional report did not refer to the Fifth Circuit's "aberrational and thin line of precedent" referred to as the "borrowed servant" doctrine does not indicate that Congress intended to allow the expansion of judicially created tort immunity.

The two-to-one majority panel in *West, supra*, felt that because there was no specific mention in the Congressional record of the intention of Congress to overrule the Fifth Circuit's "borrowed servant" doctrine, that then Congress must not have intended to abolish what the Fifth Circuit had created. In his disagreement with the majority in *West, supra*, Judge Albert Tate, in his concurring opinion, states at P. 534:

> "The Congressional report did not refer to this thin line of mostly Fifth Circuit jurisprudence [the 'borrowed servant' immunity theory], totally inconsistent with the general purposes and express language of the 1984 amendments. I do not find the absence of reference to these decisions, in the brief conclusory statement

> of the legislative report, as any indication that the Congress desired to preserve the precedential effect of all and any pre-1984-Amendment judicial decisions, nor especially of any that were completely contrary to the unambiguous language of the 1984 amendments - which was specifically intended to clarify that a general contractor enjoyed no tort-immunity as to work-injuries sustained by a subcontractor's employee, where that subcontractor had [as here] secured the payment to the injured employee of compensation benefits accorded him by the Act."

The intent of Congress could not have been made more clear than it was stated in the above quotation from the legislative history. The Fifth Circuit is clearly wrong in saying that because Congress did not specifically address what Judge Tate calls an "aberrational and thin line of precedent" [the Fifth Circuit's "borrowed servant" rule], that the statute should not be interpreted as it is written.

There is no logical basis for extending immunity because of a borrowed employee status. The "borrowed servant" doctrine, as it has been historically applied, places *liability* on the borrowing employer, who exercises control, over the employee, when the employee causes injury to a third person. In such circumstances, the hiring employer, who relinquishes control of the employee, is then no longer liable. The rationale as noted by the Supreme Court in the often quoted case entitled *Standard Oil Co. v. Anderson*, 212 U.S. 215, 29 S.Ct. 252, 53 L.Ed. 480 (1909) is stated at page 221: "that the master is answerable for the wrongs of his servant, not because he has authorized them nor because the servant, in his negligent conduct represents the master, but because he is conducting the master's affairs, and the master is bound to see that his affairs are so conducted that others are not injured." The legal basis for

imposing liability is one of *control* and *responsibility*. When the employee is placed under the control of the borrowing employer, the borrowing employer becomes responsible for the employee's activities in carrying out its work. In such circumstances, the hiring employer, who has given up control to the borrowing employer, is no longer legally responsible for the torts of the employee.

In the Fifth Circuit, oil companies that customarily hire labor contractors have tried to extend the "borrowed servant" doctrine to obtain *immunity* for injuries to employees caused by the oil companies' fault. The oil companies argue that since they are responsible for the borrowed employee's torts to other third persons, just as if they were an actual employer, they should likewise be immune for the torts caused by the employee (again just like an actual employer). The argument, however, is ill-founded. There is nothing unjust or unfair in holding contractors responsible for damages to others caused by borrowed employees who work under their dominion and control. The basis for employer immunity stems not from control or responsibility for the employee's torts, but from the historical "quid pro quo" scheme of worker's compensation. In exchange for the employee's right to medical expenses and to receive a portion of his wages in the form of compensation without the necessity of having to prove fault on the part of the employer, the employer is given immunity from having to pay full tort damages including reimbursement for full wage loss. Since companies, such as ARCO, do not participate in providing compensation benefits, there is no fair basis for granting immunity that comes only with the *quid pro quo* arrangement.

There is another logical reason why the theory fails. ARCO asks to be substituted as the "employer" in that part of § 905(a) which states: "The liability of an

employer...shall be exclusive and in place of all other liability of such employer to the employee..." However, ARCO and other proponents of the "borrowed servant" doctrine ignore the next phrase in § 905(a): "...except that if an employer [ARCO, for the sake of argument] *fails to secure payment of compensation* as required by this Act, an injured employee... *may elect* to claim compensation under the Act, or *to maintain an action at law* or in admiralty *for damages on account of such injury* or death..." (Emphasis added.) It is undisputed that ARCO did *not* secure payment of compensation; petitioners would then have the right to elect to claim compensation, or as here, maintain an action at law for damages. This second phrase of § 905(a) is a penalty provision of sorts applicable to employers that fail to secure compensation. Certainly, had Liberty failed to secure compensation Berghman would have his choice of remedies against Liberty: 1) a claim for compensation under the Act, or 2) a tort action for damages. If the real employer (Liberty) in the Act loses his tort immunity under the Act for failing to secure compensation, why should a substitute employer not be controlled by the same provisions? ARCO and other such companies want it both ways. They desire to be substituted into the immunity portion of § 905(a), but they ask the courts to disregard the penalty provision which imposes tort liability in the event compensation is not secured.

As mentioned above in detail, Congress has gone to great lengths in the 1984 amendments to demonstrate that the immunity given by the LHWCA shall be given *only* to the employer that actually pays the compensation. The Congressional intent to limit immunity has been made clear. This Court should lend guidance to the lower courts on this federal issue.

There is sound public policy for the statutory scheme of limiting immunity coupled with protecting the employee's right of full tort recovery from the party at fault.

The paramount objective of all compensation statutes is not only to provide benefits to the injured worker, but most importantly, to promote work place safety in order to minimize future casualties to others. Negligent general contractors (like ARCO) which provide unsafe working conditions will be made accountable for the injuries they cause to the injured subcontractor employees only if they are made economically answerable. This fiscal accountability provides a strong incentive to correct hazardous working conditions which are solely under the control of the general contractor or, as here, the offshore platform owner.

There is a basic unfairness in the distribution of insurance costs when the party at fault is immune for the damages it causes. Providing immunity to a general contractor like ARCO shifts the financial responsibility for the injuries which it causes to insurers of the subcontractors, such as Liberty Services here. If because of unsafe working conditions under the exclusive control of ARCO, Liberty's claims experience increases then Liberty and *not* ARCO will be penalized with the cost of higher insurance premiums. The higher cost of insurance would then be necessarily passed on in the form of higher labor bids by Liberty to ARCO. Eventually, the competitiveness of the subcontractor's bid would make it more economically advantageous for ARCO to award its work to other contractors that have not had the disadvantage of a high claims history (which unfairly was caused by ARCO's unsafe work place). Thus, in this situation, the subcontractor, who pays the compensation premium and who has no control over the unsafe working conditions, is the entity that is truly penalized. The injured employee would also be penalized if

he is deprived of his Congressionally protected right of full tort recovery for his injuries. The only profiteer under this scheme would be companies, such as ARCO, who pay no compensation and who are not made economically accountable for the unsafe work place injuries that they cause. More importantly, since the payer of the premium has no authority to eliminate the dangerous conditions, the economic emphasis to eliminate the hazards does not exist.

In a law review article which reviews the 1984 LHWCA amendments, the author discusses the Congressional policy reasons for limiting immunity to only the employer that secures the payment of compensation benefits. At page 372 of *Comment*, "We Say What We Mean, and We Mean What We Say: The 1984 Amendments to Sections 904 and 905 of the LHWCA" *La.L.Rev.* 361 (Nov. 1985) the author states: "If the employee is unable to absorb the loss between the compensation he receives and the actual losses of his injury, then those losses will ultimately fall upon the taxpayers in the form of federal and state assistance programs. Holding the general contractor liable for these losses, allows them to be equitably distributed to the ultimate consumers of the product which led to the loss." In doing so, the consumer who derives the benefits of the product will also pay for all of the risks associated with its manufacture.

Thus, there is a strong public policy purpose in the intent of Congress to make companies, such as ARCO, financially responsible for the damages that they cause. There is simply no sound legal or public policy reason that justifies the judicial creation referred to by the Fifth Circuit as "borrowed servant" immunity. The frustration of other Fifth Circuit judges in following the *West v. Kerr McGee Corp., supra*, decision was expressed by Judge Alvin Rubin in *Doucet v. Gulf Oil Corp.*, 783 Fd.2d 518 (5th

Cir. 1986). At pp. 522-523, Judge Rubin stated his dilemma in quoting from Judge Tate's well-reasoned, concurring opinion in *West* as follows:

> "If the question were open, we might agree with Judge Tate's concurring opinion in *West*:
>
> > 'It makes no functional sense to hold that a contractor, immune under the Act from compensation remedy for injuries received by a subcontractor's employees, is nevertheless also entitled to tort immunity because of the exclusive nature of the compensation remedy accorded, not at all against the contractor, but solely against the subcontractor.'
>
> "But circuit authority culminating in *West* fixes the law of the circuit."

Since circuit authority has gone awry, this Honorable Court should grant writs in order to address this important federal law question.

SUMMARY

In the last twenty years since *Ruiz,* thousands of injured workers have been deprived recovery because of the *dicta* that appears in that decision. Neither *Ruiz,* nor any other case in the Fifth Circuit, has contained a thorough analysis of the *"borrowed servant" doctrine as it relates to* the LHWCA or public policy. The United States Supreme Court has never addressed the issue. The theory of "borrowed servant" immunity is more questionable now than ever, especially because of the 1984 amendment to the LHWCA.

There is no statutory or public policy reason for the creation of this judicial concept. The U. S. district courts within the Fifth Circuit routinely dismiss otherwise valid claims because of the "borrowed servant" notion. This issue represents an important question of federal law which has not been, but should be, settled by this Court. As intimated by Judge Rubin in the *Doucet* opinion, *supra,* as quoted above, the lower courts are bound by a questionable holding which has become the law of the circuit. The concept of "borrowed servant" immunity directly conflicts with the Acts of Congress; this is the type of federal question issue and dilemma which can only be addressed by this Court.

For the above reasons, it is respectfully requested the petitioners' application for a *Writ of Certiorari* be granted.

Respectfully submitted,

STANGA & MUSTIAN, P.L.C.

BY: _____

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CERTIFICATE OF SERVICE

I, Alonzo T. Stanga, III, a member of the Bar of the United States Supreme Court, do certify that service of three (3) copies of this petition for writ of certiorari was made by mail on Atlantic Richfield Company, through its counsel of record Michael M. Christovich, at the offices of Christovich & Kearney, 2300 Pan-American Life Center, 601 Poydras Street, New Orleans, Louisiana 70130-6078, McDermott, Inc. through its counsel of record, Andre J. Mouledoux, at the offices of Hebert, Mouledoux & Bland, 1650 Pan-American Life Center, 601 Poydras Street, New Orleans, Louisiana 70130 and upon Houma Industries, Inc., through its counsel of record J. Mark Graham, at the offices of Henderson, Hanemann & Morris, 300 Lafayette Street, Houma, Louisiana 70360, all in accordance with Rule 29, paragraph 3 of the rules of the Supreme Court of the United States this 24 day of November, 1992.

ALONZO T. STANGA, III
Attorney for Plaintiffs

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3365
Summary Calendar

FILED
AUG 31 1992

Joseph J. Berghman, et al,
Plaintiffs/Appellants,

v.

Atlantic Richfield Company,
Defendant/Appellee.

Appeal From the United States District Court
for the Eastern District of Louisiana
(CA-91-2536J)

Before GARZA, Reynaldo G., SMITH and WIENER, Circuit Judges.

PER CURIAM*

The plaintiff, Joseph J. Berghman joined by his

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

spouse Joetta Berghman, sued Atlantic Richfield Company (hereinafter referred to as "ARCO") alleging that the plaintiff Berghman had been injured while on an ARCO platform. He later amended his complaint to sue others as defendants including the designer and fabricator of the platform, McDermott Incorporated, as well as Houma Industries, Inc., which had performed painting and other services on the subject platform. These defendants are not involved in this appeal.

ARCO filed a motion for summary judgment on the grounds that plaintiff Berghman was a borrowed servant of ARCO and that he was relegated to benefits under the Longshoreman's & Harbor Workers' Act.

Berghman was allegedly injured on August 4, 1990 on an offshore oil platform owned and operated by ARCO and designated as the Echo platform. He had been employed as a roustabout by Liberty Services, Inc., (hereinafter referred to as "Liberty"), and initially assigned to ARCO platforms "A","D" and "G" before being assigned to the Echo platform. The accident where he was injured happened approximately eight months after this assignment to the Echo platform and Liberty's insurer has paid workers compensation benefits to plaintiff.

The testimony before the court at the time the motion for summary judgment was ruled upon consisted of affidavits and the deposition of Berghman. The district court, after examining the testimony before it granted the motion for summary judgment and held that Berghman was in truth and in fact a borrowed servant of ARCO.

We have examined the evidence that was before the district court anew and that evidence, especially the deposition of Berghman himself, shows without a shadow of a

doubt that Berghman was in truth and in fact a borrowed servant. In *Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969), our circuit articulated nine factors to be evaluated by the court to determine whether the borrowed servant doctrine applies. They do not deserve repetition here. Measuring the evidence before the court and the factors noted above, there is no question but that Berghman was a borrowed servant.

The appellant, Berghman, makes a further argument that the 1984 amendments to the Longshoreman's and Harbor Workers' Act to §904(a) and §905(a) affected the borrowed servant doctrine. He suggests that ARCO is precluded from tort immunity because it did not secure payment of the plaintiff's compensation benefits. This argument is frivolous. The law is clear that the 1984 amendments did not affect the established borrowed servant doctrine. *Melancon v. Amoco Production Co.*, 834 F.2d 1238, (5th Cir. 1988).

In *West v. Kerr-McGee*, 765 F.2d 526 (5th Cir. 1985), this court explained that:

> The legislative history of the 1984 amendments unambiguously demonstrate that Congress' sole purpose in amending §904(a) and §905(a) was to overrule WMATA, and not to amend the borrowed servant doctrine or otherwise modify LHWCA law.

Finding that the court below was correct in its finding that Berghman was a borrowed servant, the granting of summary judgment for ARCO is hereby AFFIRMED.

APPENDIX B

MINUTE ENTRY
CARR, J.
MARCH 24, 1992

FILED
MAR 24 3:28PM '92

JOSEPH J. BERGHMAN, ET AL	CIVIL ACTION
VERSUS	NO. 91-2536
ATLANTIC RICHFIELD COMPANY	SECTION "J" (5)

This matter is before the Court on Defendant's, Atlantic Richfield Company ("ARCO"), motion for summary judgment on the issue of whether plaintiff was ARCO's "borrowed employee."

In *Ruiz v. Shell Oil Company,* 413 F.2d 310, 314 (5th Cir. 1969), the United States Fifth Circuit Court of Appeals set forth the factors that must be evaluated for determining borrowed employee status under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901, *et seq.* The Court held that no one of these factors, or any combination of them is decisive, and no fixed test is used to determine the existence of a borrowed employee relationship. *Id.* at 312.

Under the undisputed facts of this case, plaintiff is a borrowed employee of ARCO and hence his exclusive

Date of Entry March 25 1992

remedy is controlled by the Longshore and Harbor Workers' Compensation Act. Accordingly, plaintiff's suit shall be dismissed with prejudice.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
MAR 24 3:28PM '92

JOSEPH J. BERGHMAN, ET AL	CIVIL ACTION
VERSUS	NO. 91-2536
ATLANTIC RICHFIELD COMPANY	SECTION "J" (5)

JUDGMENT

Pursuant to the Court's Minute Entry of March 24, 1992,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the above captioned action be **DISMISSED** with prejudice, each party to bear its own costs.

New Orleans, Louisiana, this 24th day of March, 1992.

/s/ Patrick E. Carr
UNITED STATES DISTRICT JUDGE

Date of Entry March 25 1992

APPENDIX D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

FILED
APR 9 10:40AM '92

JOSEPH J. BERGHMAN, ET AL	CIVIL ACTION
VERSUS	NO. 91-2536
ATLANTIC RICHFIELD COMPANY	SECTION "J" (5)

O R D E R

Because this case was closed in error, **IT IS HEREBY ORDERED**, that this case be **REINSTATED.**

New Orleans, Louisiana, this the 8th day of April, 1992.

/s/ Patrick E. Carr
UNITED STATES DISTRICT JUDGE

Date of Entry APR 14 1992

APPENDIX E

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

FILED
APR 6 2:42PM '92

JOSEPH J. BERGHMAN, ET AL	CIVIL ACTION
VERSUS	NO. 91-2536
ATLANTIC RICHFIELD COMPANY	SECTION "J" (5)

AMENDED PARTIAL JUDGMENT PURSUANT TO RULE 54(b)

Pursuant to the Court's Minute Entry of March 24, 1992;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant, Atlantic Richfield Company, on its motion for summary judgment and that defendant, Atlantic Richfield Company, be **DISMISSED** with prejudice, each party to bear its own costs.

This partial judgment is entered pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Court having expressly determined that there is no just reason for delay in the entry of judgment.

New Orleans, Louisiana, this 6th day of April, 1992.

/s/ Patrick E. Carr

UNITED STATES DISTRICT JUDGE

Date of Entry APR 14 1992

APPENDIX F

EXCERPTS FROM EXHIBIT 1 (attached to Motion for Summary Judgment)

TSL-30355

ARCO Oil and Gas Company **Term Agreement**

This agreement is entered into effective as of the 1st day of February, 1990, between
Liberty Services, Inc.,
P. O. Box 99, Belle Chasse, La. 70037.
("Contractor") and ARCO Oil and Gas Company, a Division of Atlantic Richfield Company, a Delaware corporation, with an address at
P. O. Box 51408, Lafayette, LA 70505-1408

in consideration of the agreements made by each with the other. Contractor and ARCO hereby agree as follows:

1. Work

The work subject to this agreement shall be all the goods and services provided by Contractor at the request of the *Southeastern* District of ARCO Oil and Gas Company during the term of this agreement, except for specific services, if any, for which the parties may enter a separate written contract.

* * * * * * * * * *

8. Independent Contractor Relationship

8.1 Contractor shall be an independent contractor with respect to performance of all work and neither Contractor nor anyone employed by Contractor shall be deemed for any purpose to be the employee, agent, servant, or representative of ARCO. ARCO shall have no direction or control of Contractor or its employees and agents except in

the results to be obtained. The work shall meet the approval of ARCO and be subject to ARCO's right of inspection.

8.2 The actual performance and superintendence of all work hereunder shall be by Contractor, but ARCO or its representatives shall have unlimited access to the premises to determine whether work is being performed by Contractor in accordance with all of the provisions of this agreement.

9. Contractor's Workers and Equipment

All workers furnished by Contractor and all representatives of Contractor, shall be the agents or employees of Contractor or Contractor's subcontractor at all times, and shall not at any time or for any purpose whatsoever be employees or agents of ARCO. All the workers shall be experienced and qualified for their tasks. ARCO shall at all times have the right to reject from the work any employees of Contractor or of any subcontractors whom ARCO deems unqualified or otherwise unsatisfactory for any reason and Contractor shall replace those employees with ones acceptable to ARCO. Contractor, at its own cost and expense, shall provide the necessary labor, services, machinery, consumable materials and supplies, tools and appliances, including but not limited to safety appliances appropriate to the performance of the work covered by this agreement.

* * * * * * * * * *

12. Insurance

12.1 Without limiting the indemnity obligations or liabilities of Contractor or its insurers, at all times during the term of this agreement, Contractor shall carry insurance of the types and in minimum amounts as follows:

a. Workers' Compensation, including Occupational

Disease, as may be required by the laws of the jurisdiction in which the work is performed and Employer's Liability Insurance with minimum limits of $1,000,000 per occurrence.

If the performance of the agreement requires the use of watercraft or is performed over water, Contractor shall provide coverage for liability under the U.S. Longshoremen's and Harbor Workers' Compensation Act, the Outer Continental Shelf Lands Act and liability for admiralty benefits and damages under the Jones Act, Death on the High Seas Act, and general maritime law on all employees, except members of crews of vessels if full crew liabilities are covered by Protection and Indemnity Insurance, and shall further provide that a claim "in rem" shall be treated as a claim against the employer.

* * * * * * * * * *

12.2 a. For liabilities assumed under this agreement by Contractor, its insurance shall be endorsed to provide that the underwriters and insurance companies shall not have any right of subrogation against ARCO and its subsidiaries, co-owners, and joint venturers, if any, and their agents, employees, officers, servants, underwriters, and insurance companies. ARCO will, as well, cause its insurer to waive subrogation against Contractor and its subsidiaries, and the agents, employees, co-owners, joint venturers, officers, servants, underwriters, and insurance companies of both for liabilities ARCO assumes.

b. All the insurance shall be carried by Contractor at Contractor's expense with an insurance company or companies authorized to do business in the jurisdiction where the work is to be performed and satisfactory to ARCO. Contractor shall procure from the

company writing the insurance a certificate or certificates satisfactory to ARCO that the insurance is in full force and effect and that it shall not be cancelled or materially changed without thirty (30) days prior written notice to ARCO. All Certificates of Insurance must contain reference to endorsements (i.e. Waiver of Subrogation, etc.) as required herein. Upon ARCO's request, ARCO may examine true copies of the actual policies.

c. All policies shall be endorsed to provide that there will be no recourse against ARCO for payment of the premium.

d. Contractor shall require all its subcontractors to obtain, maintain and keep in force during the time they are performing work under this agreement equivalent coverage and furnish ARCO acceptable evidence of that insurance upon its request. All policies of subcontractors shall be endorsed to provide a waiver of subrogation as set forth in 12.2.a.

e. Any coverage for ARCO provided by Contractor's insurance under this agreement is primary insurance and shall not be considered contributory insurance with any insurance policies of ARCO, its subsidiaries, co-owners or joint venturers, if any.

f. Any and all deductibles in the insurance policies shall be assumed by, for the account of and at Contractor's sole risk.

13. Indemnity

13.1 Contractor shall protect, defend and indemnify ARCO and ARCO's co-owners, and their respective officers, directors and employees from and against all claims, demands and causes of action of every kind and character that arise out of or are related to the work this agreement and are caused by or arise out of Contractor's negligence or willful misconduct and result in personal injury, death or property loss or damage, except to the extent ARCO ahs assumed either responsibility for pollution or the risk of loss of ARCO's or Contractor's property under this Section 13 or Section 14.

13.2 ARCO shall protect, defend and indemnify Contractor and its officers, directors and employees from and against all claims, demands and causes of action of every kind and character that arise out of or are related to the work under this agreement and are caused by or arise out of ARCO's negligence or willful misconduct and result in personal injury, death or property loss or damage, except to the extent Contractor has assumed either responsibility for pollution or the risk of loss of Contractor's property under this Section 13 or Section 14.

* * * * * * * * * *

IN WITNESS WHEREOF, this agreement is executed on the dates shown below but effective as of the date first above written.

Cont. Witnesses	Cont. LIBERTY SERVICES, INC.
/s/ Steve Lorger	By:Pres.-Richard L. Bell Title
/s/Joe Andus 1/29/90	Date: 1/29/90
ARCO Witnesses	ARCO Oil and Gas Company, a Division of Atlantic Richfield Company
/s/ Luis Eastlack 2-1-90	By: R. K. Dofz, Offshore Area Mgr.
W. J. Kasper, Jr. 2-1-90	Date: 2/1/90, 1990